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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re the Marriage of ELIZABETH and THOMAS L. KNOWLES.	
ELIZABETH ANASTASI, Appellant, v. THOMAS L. KNOWLES, Appellant.	C057851 (Super. Ct. No. FL001965)

APPEAL from a judgment of the Superior Court of Butte County, Robert A. Glusman, Judge. Reversed with directions.

Bill J. Cook Law Corporation and Bill J. Cook for Appellant Thomas L. Knowles.

Les Hait Law Corporation and Les Hait for Appellant Elizabeth Anastasi.

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* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of II through V.

Family Code section 4057.5, subdivision (a)(1) prohibits consideration of the income of a subsequent spouse when modifying child support. Here, the father and his subsequent spouse owned substantial community assets, which generated income. In modifying a child support order, the trial court considered, as the father's income, all of the community income of the father and his subsequent spouse. In the published portion of this opinion, we conclude that the trial court violated Family Code section 4057.5, subdivision (a)(1) by considering the half of the community income attributable to the subsequent spouse when it modified the father's child support obligation.

Accordingly, we reverse the trial court's modification of the father's child support obligation and remand for further proceedings.

In the unpublished portion of this opinion, we reject the remainder of the father's contentions on appeal, as well as the mother's contention raised in her appeal.

BACKGROUND

This is a brief summary of the proceedings. More specific descriptions of the proceedings are provided as they become relevant to the discussion of the issues raised by the parties. For brevity and clarity, we refer to the parties and others by their first names.

Thomas and Elizabeth are the parents of one minor child, Carter. They share custody of the child equally.

On January 6, 2005, Elizabeth filed a motion to increase Thomas's child support obligation. She stated that, since 1995, child support paid by Thomas has been $506 per month.

After prolonged proceedings, the trial court issued a statement of decision and judgment on November 7, 2007. The statement of decision and judgment modified child support from Thomas to Elizabeth to $1,557 per month. The court made the order retroactive to January 6, 2005, the date of Elizabeth's original motion to modify child support. The court also ordered Thomas to pay $20,000 in attorney fees for Elizabeth.

In addition to the support modification and the award of attorney fees, the statement of decision and judgment provided for an order to show cause why Thomas's current wife, Sara, who is an attorney and originally represented Thomas in his opposition to Elizabeth's motion to modify child support, should not be ordered to pay sanctions based on her actions while she represented Thomas. The court determined that it would report Sara's misconduct to the California State Bar.

On December 12, 2007, the court ordered Sara to pay Elizabeth $2,000 in sanctions.[1]

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[1] On appeal, Thomas asserts that we should reverse the sanctions order against Sara and the trial court's decision to report her conduct to the California State Bar. Because Sara has not filed a notice of appeal, we are without jurisdiction to consider this assertion. When a sanctions ruling is imposed only upon a party's attorney, the attorney is the aggrieved party with the right to appeal. (*Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42-43.) Absent

Both Thomas and Elizabeth appeal.[2]

THOMAS'S APPEAL

I

Community Property Income

Thomas contends the trial court erred by using all of the community property income of his subsequent marriage to Sara for the purpose of computing child support. He asserts that the trial court was limited to using the community income attributable to him only and that it was error also to use the community income attributable to Sara. Based on Family code section 4057.5, subdivision (a)(1), we agree.

A. *Background*

Neither party presents a particularly coherent account of Thomas's wealth and income because each picks and chooses what

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any attempt to appeal by the sanctioned party, the sanction ruling is not reviewable. (*Ibid.*)

[2] Thomas's briefing on appeal, in particular, his reply brief, is full of the vitriol that is anathema to civil and professional conduct essential to the resolution of family law disputes. No less than eight times does Thomas's counsel accuse Elizabeth's counsel of unprofessional conduct, mainly because Thomas's counsel disagrees with the way in which Elizabeth's counsel interprets the law or the facts. Thomas's counsel also accuses the trial judge of bias and refers to the judge in a condescending manner. Arguing against Elizabeth's contention of error in her appeal, Thomas's brief states that the judge "didn't get it *all* wrong." (Original italics and underscoring.)

"Because of the complex and sensitive nature of marriage dissolution proceedings, it is in the best interests of both parties to resolve all issues expediently and congenially . . . ." (*In re Marriage of Norton* (1988) 206 Cal.App.3d 53, 58.)

evidence to present. The trial court, however, made findings in this regard, and the parties did not contest those factual findings, even if they now contest the legal effect of those findings. Accordingly, we base our summary of Thomas's wealth and income on the court's statement of decision. (*See Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1617 [we accept facts in statement of decision].)

Thomas had worked full-time as the ranch manager for Knowles Ranch. He was an equal partner with his father and mother and took a partnership draw in lieu of a salary. In December 2005, however, he stopped working for the partnership, partly because he had been successful in some real estate investments. Thomas abandoned all earned income to begin a commercial charter aircraft business, which is not a profitable venture. Based on Thomas's former work as a ranch manager, the trial court imputed an income ability on Thomas's part of $50,000 per year, or $4,166 per month.

As a result of investments made after their marriage, Thomas and Sara enjoyed capital gains in 2004 and 2005 of more than $3.1 million. Much of these gains were invested in a brokerage account at A.G. Edwards and a real estate development in Chico called Meriam Park. The money in the A.G. Edwards account was held in Sara's name alone. According to the court, Thomas and Sara "testified that this was for 'convenience' rather than to hide [Thomas's] wealth during this litigation."

In addition to Thomas's imputed earned income of $4,166 per month, the trial court also determined that a reasonable return

on Thomas's investments would be $18,450 per month, which includes $10,950 from the brokerage account and $7,500 from the real estate development. The trial court used these figures as Thomas's monthly income in calculating his child support obligation.

Although the brokerage account and real estate development investment are community property of Thomas and Sara, the trial court considered the full amount in determining a reasonable return on those investments. In other words, the trial court did not reduce the value of the investments by 50 percent as a result of Sara's half ownership. The trial court stated: "[Thomas] has taken the position that his income should be reduced by 50 percent because it is all 'community income.' While the latter point is no doubt true, all earnings of married people are community, absent a binding agreement to the contrary. There is an exception to the rule that the income of a party is available for child support when that income is earned by the [subsequent] spouse. However, no statutory or case law has been presented or identified that stands for the proposition that capital gains, or other passive community property income of a party, such as interest income, or dividends income, should be divided for support purposes with a new spouse, making half of it unavailable for child support. Public policy points directly in the opposite direction."

B. *Analysis*

On appeal, Thomas renews his objection to the trial court's use of the full amount of the community-property brokerage

account and real estate development investment in determining Thomas's child support obligation. He claims that the court violated Family Code section 4057.5, subdivision (a)(1) which prohibits consideration of the income of a subsequent spouse when modifying child support, except in some extraordinary circumstances involving extreme hardship.[3] He asserts, in effect, that the trial court should have found a monthly return of $9,225 on the investments, rather than $18,450.

Prior to 1994, trial courts had the authority and discretion to consider a new spouse's income when setting a child support award. (*In re Marriage of Wood* (1995) 37 Cal.App.4th 1059, 1066 (*Wood*), disapproved on other grounds in *In re Marriage of Fellows* (2006) 39 Cal.4th 179, 187.) However, Family Code section 4057.5 now expressly prohibits courts from considering a subsequent spouse's income when determining or modifying child support, except in very limited circumstances.

In *Wood*, the mother was unemployed but claimed to be looking for work. The trial court did not impute any income to her for purposes of calculating child support. However, the

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[3] Family Code section 4057.5, subdivision (a)(1) provides: "The income of the obligor parent's subsequent spouse or nonmarital partner shall not be considered when determining or modifying child support, except in an extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award, in which case the court shall also consider whether including that income would lead to extreme and severe hardship to any child supported by the obligor or by the obligor's subsequent spouse or nonmarital partner."

court did consider the income of her new spouse, a wealthy, successful businessman. (*Wood, supra*, 37 Cal.App.4th at pp. 1064-1065.) Citing Family Code section 4057, the trial court found it would be "'unjust'" to apply the child support guidelines because of the "phenomenal income" of the wife's subsequent spouse. (*Wood, supra,* at p. 1065.)

The *Wood* court concluded that the trial court abused its discretion by considering the subsequent spouse's income. (*Wood, supra,* 37 Cal.App.4th at p. 1071.) Family Code section 4057.5 permits consideration of subsequent spouse income only if the child would suffer extreme and severe hardship. The court must look to the needs of the child, not the needs or conduct of the parents. (*Id.* at p. 1067.)

Here, the trial court considered all the community property income, including Sara's half, when calculating Thomas's support obligation. In doing so, the trial court made no finding of extreme or severe hardship. Thus, the trial court violated Family Code section 4057.5, subdivision (a)(1).

Income generated from community property is community income, and an equal, undivided interest in that income is attributable to each spouse. (See Fam. Code, § 751 [spouses have equal interest in community property]; *United States v. Malcolm* (1931) 282 U.S. 792 [75 L.Ed. 714] [each spouse must report and pay taxes on half of community income].) Therefore, the trial court erred by including Sara's half of the community income when calculating Thomas's child support obligation.

As did the trial court, Elizabeth relies on Family Code section 4008 to support the use of Sara's half of the community income. Family Code section 4008 provides: "The community property, the quasi-community property, and the separate property may be subjected to the support of the children in the proportions the court determines are just." This statute is not inconsistent with our interpretation of Family Code section 4057.7. While, pursuant to Family Code section 4008, the obligor parent's community interest in the income of the subsequent spouse may be looked to in *discharge* of the child support obligation (*In re Marriage of Brown* (1979) 99 Cal.App.3d 702, 705), the court may not consider the subsequent spouse's community income in *calculating* the child support obligation. The trial court erred when it failed to make this distinction and interpreted Family Code section 4008 as allowing it to consider Sara's community income in calculating Thomas's support obligation.

We also disagree with the trial court's statement that "no statutory or case law has been presented or identified that stands for the proposition that capital gains, or other passive community property income of a party, such as interest income, or dividends income, should be divided for support purposes with a new spouse, making half of it unavailable for child support." Family Code section 4057.5 is the law that prohibits use of the community income attributable to the subsequent spouse, whether the income is earned or is a return on investments, in calculating a child support obligation.

Finally, Elizabeth cites the trial court's invocation of public policy as a reason to uphold the court's determination. According to her, that public policy is to interpret the term "income" broadly when calculating a child support obligation. To the contrary, when a statute is on point, the public policy of this state is contained in that statute. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71-72 [Legislature vested with authority to declare public policy].) The public policy of this state concerning the use of a subsequent spouse's income in calculating a child support obligation is found in Family Code section 4057.5.

Elizabeth asserts that we should affirm even if the trial court erred in applying Family Code section 4057.5 because the court could have arrived at the same figure by different means, such as finding an extreme or severe hardship or by applying Thomas's capital gains as income for the purpose of calculating support. In support of this assertion, Elizabeth cites authority for the proposition that we affirm a correct judgment even if the trial court's rationale was wrong. (See, e.g., *Marriage of Burgess* (1996) 13 Cal.4th 25, 32 [we uphold ruling if correct on any basis, even if that basis not invoked].) That proposition, however, is not applicable here because it is not at all clear that the trial court would have arrived at the same amount of child support had it properly applied Family Code section 4057.5. In fact, we find it rather unlikely that the trial court would have arrived at the same amount had it properly applied the law. The court specifically stated how it

arrived at the support figures in its statement of decision. It did not find an extreme or severe hardship and did not justify its decision by any means other than considering Sara's income in its calculation of Thomas's support obligation.

Accordingly, we must reverse and remand for the trial court to make a new determination concerning Thomas's child support obligation, without violating Family Code section 4057.5.[4]

II

Effect of Prior Judicial Statements

Thomas asserts that "[o]n August 2, 2006, Commissioner Gunn ruled, as a ***finding of fact***, that Elizabeth's first motion for modification of child support, filed January 6, 2005, had been resolved and taken off calendar. Subsequently, this Court [*sic*, read the trial court] ruled, pursuant to Elizabeth's subsequent motion for modification of child support, that Commissioner Gunn's findings, were, in fact, ***dicta*** and 'factually incorrect.'" (Original bold text and italics; record citations omitted.) Citing this procedural history, Thomas asserts that the trial court could not make its child support order retroactive to January 6, 2005, because that motion had been "resolved and taken off calendar." The contention is not only without merit; it is frivolous.

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[4] Although we must reverse, we consider the parties' remaining contentions for guidance of the trial court on remand.

A. *Background*

Elizabeth filed her motion to modify child support on January 6, 2005, with a hearing set for February 1, 2005. After delays caused by difficulties in obtaining discovery from Thomas, Elizabeth filed a new notice of motion on February 14, 2006, requesting that her original motion be set for trial. The motion was set for a hearing on March 7, 2006, but was again delayed. On June 13, 2006, the case was heard by Commissioner David E. Gunn on the issue of interim child support. Commissioner Gunn later filed a "ruling" increasing child support on an interim basis. In the ruling, Commissioner Gunn stated, "On January 6, 2005, [Elizabeth] filed a motion to modify child support and for attorney's fees. [Thomas] responded. The matter was continued at least 9 times before being resolved on November 29, 2005. It appears that it was taken off calendar on that date, but the Minute Order does not reflect the terms of the agreement."

More than a year later, the trial court issued its statement of decision after a full hearing on the motion to modify child support. In that statement of decision, the court disagreed with Commissioner Gunn's comment that the motion filed on January 6, 2005, had been resolved. Instead, the trial court concluded that Commissioner Gunn's comment was incorrect and was "dicta." The January 6, 2005, motion had not been resolved. Therefore, the court concluded that it had jurisdiction to modify child support retroactive to January 6, 2005. (See Fam.

Code, § 3653 [allowing support order retroactive to filing of motion to modify].)

B. *Analysis*

Despite being unable to find anything in the record to support Commissioner Gunn's statement that the January 6, 2005, motion had been resolved, Thomas contends that, because Commissioner Gunn said that the motion had been resolved, the trial court was bound by that determination and could order support retroactive only to March 7, 2006, not January 6, 2005. The law does not support this contention.

Although a commissioner's orders are entitled to the same dignity as those of the trial court (see *In re Henley* (1970) 9 Cal.App.3d 924, 928 [final orders of referee entitled to same status as court's order]), Commissioner Gunn's ruling was merely interim. The trial court retained jurisdiction in the matter. In fact, Commissioner Gunn's ruling stated: "The Court reserves it's [*sic*] jurisdiction to ultimately increase or decrease this amount [referring to the interim child support], and to make any order retroactive to an earlier date."

Generally, a trial court retains jurisdiction to reconsider and modify interim rulings as long as no final judgment or order has been entered and the case is still pending. (*Travelers Ins. Co. v. Superior Court* (1977) 65 Cal.App.3d 751, 759-760.) Here, the trial court merely modified an incorrect interim ruling. It had authority to do so. Elizabeth's January 6, 2005, motion had been taken off calendar without being resolved, as discovery and further proceedings on the motion were resolved. Thomas makes

no reasonable argument, supported by authority, that the trial court could not make its order retroactive to the filing of the motion on January 6, 2005.[5]

III

Hardship Deductions

Thomas claims that the trial court erred by not granting him two hardship deductions (for his two children of his subsequent marriage). He claims that the trial court was obligated to grant the deductions because Elizabeth not only did not contest them but also included the deductions in her own filings with the court.[6] The contention is frivolous.

"If a parent is experiencing extreme financial hardship due to justifiable expenses resulting from the circumstances enumerated in [Family Code] Section 4071 [including expenses related to the parent's other children], on the request of a

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[5] Thomas also attempts to argue that, because the trial court could not consider anything that occurred before March 7, 2006, based on Commissioner Gunn's ruling, the trial court was powerless to consider Sara's misconduct while she represented Thomas and, therefore, we must reverse the sanctions and the court's determination to report Sara's conduct to the state bar. As noted above, Sara did not appeal, so she cannot seek relief on appeal. In any event, the argument fails because the trial court was not powerless to view the proceedings before March 7, 2006.

[6] Counsel for Thomas attempts to elicit sympathy for Thomas by stating that a third child has been born to the union of Thomas and Sara and that the child has had medical complications. For this factual assertion, counsel provides no record citation. Such conduct violates California Rules of Court, rule 8.204(a)(2)(c), requiring an appellant to limit the summary of facts to matters in the record.

party, the court may allow the income deductions under [Family Code] Section 4059 that may be necessary to accommodate those circumstances." (Fam. Code, § 4070.)

We review child support orders for abuse of discretion. (*Wood, supra,* 37 Cal.App.4th at p. 1066.) Here, there was no abuse of discretion in the trial court's conclusion that Thomas's duty to support the children of his subsequent marriage did not cause extreme financial hardship. Instead, the evidence was to the contrary.

Despite the evidence, however, Thomas asserts in his reply brief that Elizabeth's failure to contest the hardship deductions amounted to an implied contract and must be enforced. This assertion is risible.

Thomas states: "The fact is that [Elizabeth] allowed the hardship deductions. She consented to them. This is clearly an implied contract pursuant to California Civil Code section 1621. Elizabeth expressed an intention that Thomas should have the hardship deductions. This is not a case where it would be unjust to enforce Elizabeth's agreement. Elizabeth agreed to the hardship deductions. She, by presenting her agreement in writing, stipulated to these hardships. This is not a legal conclusion, but an issue of fact."

"An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, § 1621.) There is no evidence here that Thomas and Elizabeth entered into an implied agreement to allow him two hardship deductions or that they reached any agreement with respect to Thomas's child

support obligation. And there was no stipulation that the trial court was required to grant the requested hardship deductions. Quite the contrary, the parties did not agree as to the determination of Thomas's child support obligation, thus leaving the matter to the trial court, which did not abuse its discretion in denying the hardship deductions.[7]

IV

Alleged Bias

Thomas states: "The trial court errored [*sic*] by containing factual inaccuracies within the ruling, evidencing bias against Sara Knowles which must be reviewed under the substantial evidence standard." (Unnecessary capitalization and underscoring omitted.) Unfortunately, the argument under this heading is not much more coherent. It appears that Thomas accuses the trial court of bias. In making this accusation, Thomas cites various factual determinations in the statement of decision which he claims are not supported by the evidence. He also claims that the trial court was biased because the court took offense at Sara's assertion that the court was biased. Finally, without citing any supporting authority for the assertion, Thomas asserts that we must reverse and remand that trial court's "ruling of November 7, 2007."

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[7] Aside from the total lack of merit in Thomas's implied contract theory, he forfeited this issue by failing to raise it until his reply brief. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 [unfair to consider issues raised in reply brief].)

Thomas's failure to cite relevant authority is a forfeiture of this issue. He claims that we must reverse based on the trial court's alleged bias, but he provides no authority for that proposition. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

In his discussion of this issue, Thomas cites three cases, none of which stands for the proposition that we should infer bias from allegedly incorrect trial court rulings and statements. Nor do the cases state that reversal is required in such circumstances. He cites *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, at page 1143, for the proposition that we review a trial court's ruling on a disqualification motion for abuse of discretion. True enough, but there was no disqualification motion here. He cites *City National Bank v. Adams* (2002) 96 Cal.App.4th 315, at page 323, which states the standard of review of a trial court's ruling on a motion to disqualify an attorney. There was no such motion or ruling here. And finally, Thomas cites *Ensher, Alexander & Barsoom, Inc. v. Ensher* (1964) 225 Cal.App.2d 318, at page 322, for its discussion of the procedure and standard for disqualifying a judge. Yet, Thomas does not assert that he attempted to disqualify the trial judge. Indeed, he seeks reversal and remand for the same judge to "base [his] ruling upon the facts and evidence contained in the record."

Having failed to cite to relevant authority to support his assertion that we must reverse the trial court's child support

order because of the court's alleged bias, Thomas has forfeited appellate review of the issue.[8]

ELIZABETH'S APPEAL

V

Thomas and Sara enjoyed $3.1 million in capital gains in 2004 and 2005 from their real estate investments. Much of these gains were reinvested in the brokerage account and another real estate venture. In calculating Thomas's child support obligation, the trial court declined to include the capital gains as income for Thomas. Instead, the court determined a reasonable rate of return on the reinvested funds and included that return in Thomas's income. Thus, the trial court imputed $18,450 per month as a reasonable return on Thomas's investments.

Explaining its exercise of discretion in not treating the capital gains as income but instead adding to Thomas's income a reasonable rate of return on the reinvested funds, the trial court stated: "[Thomas] is not in the business of property development. His capital gain income represents the liquidation of his capital assets. The Court believes that including capital gain income would result in a substantial spike in child

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[8] Because Thomas forfeited review of this issue, we need not consider it. However, because an assertion that a judge was biased is a serious accusation, we note that we see no evidence of bias in the trial court's statements and rulings, even though they may have shown justified frustration with and disdain for Sara's unprofessional conduct and accusations. Instead, Thomas and Sara were at fault with their dishonesty and perjury.

support for a child the age of Carter (16) and the 50/50 timeshare the parties exercise. Such a spike would not be in the interest of justice. [Thomas] has reinvested the capital gain into other assets from which the Court has imputed a reasonable rate of return and added that amount to [Thomas's] gross income in the child support calculation."

Elizabeth contends that this ruling was an abuse of discretion because it did not enable Carter to enjoy the same lifestyle that Thomas enjoys. This contention is without merit because (1) Elizabeth fails to cite to evidence that Carter's lifestyle is substantially worse than Thomas's and (2) the trial court properly exercised its discretion.

A. *Legal Background*

One statute and two cases provide the legal background for this issue -- Family Code section 4053, *In re Marriage of Pearlstein* (2006) 137 Cal.App.4th 1361 (*Pearlstein*), and *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269 (*Cheriton*).

Family Code section 4053 provides that "[a] parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life" and "[e]ach parent should pay for the support of the children according to his or her ability." (Subds. (a) & (d).) The statute requires the trial court to adhere to these general principles. (Fam. Code, § 4053.)

In *Cheriton*, the father received stock options from Cisco, worth $45 million at the time of trial, for his work for Cisco. The trial court refused to impute income to the father based on

his ownership of the stock options. (92 Cal.App.4th at pp. 280, 282.) The Court of Appeal reversed. It concluded that the trial court should have imputed income to the father based on the ownership of the stock options because the failure to do so prevented the children from participating in their father's wealth. Citing Family Code section 4053, the court determined that a parent's wealth is an appropriate consideration in setting child support. (*Id.* at pp. 289-292.)

In *Pearlstein*, the father sold his shares of stock in his business for stock in the acquiring company and cash that would be paid over time. In calculating the father's child support obligation, the trial court treated the value of the stock and the cash as income. (137 Cal.App.4th at pp. 1365-1370.) The Court of Appeal reversed in part, finding that the trial court should not have treated the proceeds of the sale of the stock as income but instead should have calculated a reasonable rate of return on the stock as the father's income. The court also held that, to the extent that the father sold stock in the acquiring company and spent the proceeds, it could be deemed income. (*Id.* at pp. 1375-1376.) The *Pearlstein* court distinguished *Cheriton*, stating that the father's unliquidated stock ownership was not analogous to a stock option, which is a form of executive compensation. (*Id.* at p. 1363.)

The trial court here expressly relied on *Pearlstein* in calculating Thomas's child support obligation.

B. *Analysis*

1. Evidence of Lifestyle

Elizabeth asserts that, when Carter is with her, he does not enjoy the same lifestyle that Thomas enjoys. However, she does not refer us to the evidence for this assertion. Because Elizabeth fails to support this factual contention with citations to the record, we cannot rely on her factual representations. (Cal. Rules of Court, rule 8.204(a)(2)(C); *Mansell v. Board of Administration, supra,* 30 Cal.App.4th at p. 545 [assertions unsupported by record citations are forfeited].) In its statement of decision, the trial court noted that "[Elizabeth] has remarried and resides in her husband's home and when residing with her, Carter (the parties' minor child) lives in a separate unit at the house referred to as a 'Casita.'"

2. Exercise of Discretion

Elizabeth contends that the holding in *Cheriton* required the trial court to treat Thomas's capital gains as income so that Carter would be able to participate in his father's wealth. To the contrary, the trial court's use of a reasonable return on capital as Thomas's income was a rather unremarkable application of *Pearlstein* and was not an abuse of discretion.

Unlike the extreme case presented in *Cheriton*, where the father accumulated vast wealth for which the trial court did not account in making its child support order, the court here properly accounted for the capital assets by using a reasonable rate of return as Thomas's income. Doing so did not violate the public policy found in Family Code section 4053 that a parent

such as Thomas has a duty to support his child according to the parent's circumstances and station in life.

The trial court did not abuse its discretion in the treatment of Thomas's capital gains.

DISPOSITION

The order modifying Thomas's child support obligation is reversed and remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.